

June 13, 2005

Maggie Johnston
Acting Retirement Administrator
Marin County Employees'
Retirement Association
3501 Civic Center Drive, Room 408
San Rafael, CA 94903-4189

**Re: Your Request for Advice
Our File No. A-05-028**

Dear Ms. Johnston:

This letter is in response to your request on behalf of the Marin County Employees' Retirement Association, for advice regarding the mass mail provisions of the Political Reform Act (the "Act").¹ Please note that nothing in this letter is intended to address the propriety of any past mailings, as we do not render advice regarding past conduct. (Reg. 18329; *In re Ogelsby* (1975) 1 FPPC Ops. 71.)

QUESTION

May the Marin County Employees' Retirement Association ("MCERA") publish information and photographs of Board members in its quarterly newsletter and website without regard to the mass mailing restrictions contained in the Act?

CONCLUSION

No. The MCERA's tangible version of its contemplated quarterly newsletter is subject to the prohibitions against publicly funded mass mailings described in the Act. But the scope of such restrictions is limited; for example, information you wish to publish

¹ Government Code sections 81000 – 91014. Commission regulations appear at title 2, sections 18109-18997, of the California Code of Regulations. All further references to statutory "sections" will be to the Government Code and all further references to "regulations" will be to title 2 of the California Code of Regulations, unless otherwise indicated.

about “non-elected” Board members, or on your website, is not regulated under such provisions of the Act.

FACTS

The Marin County Employees’ Retirement Association (“MCERA”) administers a defined benefit plan for employees of Marin County and several other contracting districts. The MCERA publishes a quarterly newsletter that is distributed to all association members and anyone in the public requesting a copy. The newsletter informs recipients of recent items of interest having to do with the retirement association. The MCERA also runs a web site (www.mcera.org) that contains information about the MCERA Board.

Your letter of inquiry indicates that when the MCERA has a newly elected, appointed, re-elected or reappointed Board member, the Association likes to publish a brief biography and picture of the new member so the Association members know who is representing them. In a recent survey of your Association members, they requested more personal information and photos of the Board members, both in the Association newsletter and on its website.

The MCERA Board is comprised of nine sitting members and two alternates. Of the nine sitting board members, four are appointed by the Marin County Board of Supervisors, and four (plus the two alternates) are elected by the association membership. The ninth acting member of the Board holds that office (ex-officio) by virtue of holding office as Marin County Treasurer. In our March 23, 2005 telephone conversation, you indicated that the Treasurer is the only MCERA Board member that is elected (to the office of County Treasurer, but not to the MCERA Board) by the Marin County voters at large.

In our March 23 telephone conversation, you also described how the membership elects candidates to fill the four (plus two alternate) board member spots the membership is allowed to elect to the Board. The association’s membership (consisting of both current employees and retirees) totals less than 5,000. Members vote annually to fill whichever of the four plus two alternate positions on the MCERA Board are expiring at that time. The MCERA Board member terms are staggered. Every year, members of the association are sent ballots by mail at least one week before an election, which is usually held on the last Friday of July.

In our April 22 telephone conversation, you also indicated that MCERA is governed by the Brown Act and its members are employees or former employees of various public entities in the Marin County area. MCERA receives the majority of its funding from those public entities. The rest of MCERA’s funding comes directly from contributions by public employee-members. In our June 3 telephone conversation, you indicated that the MCERA expressly uses a mix of public and employee-member funds to produce and distribute its newsletter.

ANALYSIS

A. The Act's Pertinent Mass Mailing Statute and Regulation

In 1988, Section 89001 of the Act was added to provide that “[n]o newsletter or other mass mailing shall be sent at public expense.” In order to avoid the absurd result of literally prohibiting any and all mass mailings created or distributed with public funds, regardless of their content or purpose, the Commission adopted regulation 18901, clarifying which mailings were permissible and which were not.

Under regulation 18901, a mass mailing is defined as more than 200 substantially similar tangible items delivered in a calendar month, by any means, to recipients at their residence, place of employment, business, or post office box. (See also Section 82041.5 and Reg. 18435 [defining “mass mailing”].) The Act’s key provision governing mass mailings is regulation 18901, subdivision (a), which states:

“(a) Except as provided in subdivision (b), a mailing is prohibited by section 89001 if all of the following criteria are met:

“(1) Any item sent is delivered, by any means, to the recipient at his or her residence, place of employment or business, or post office box. For purposes of this subdivision (a)(1), the item delivered to the recipient must be a tangible item, such as a videotape, record, or button, or a written document.

“(2) The item sent either:

“(A) Features an elected officer affiliated with the agency which produces or sends the mailing, or

“(B) Includes the name, office, photograph, or other reference to an elected officer affiliated with the agency which produces or sends the mailing, and is prepared or sent in cooperation, consultation, coordination, or concert with the elected officer.

“(3) (A) Any of the costs of distribution is paid for with public moneys; or

“(B) Costs of design, production, and printing exceeding \$ 50.00 are paid with public moneys, and the design, production, or printing is done with the intent of sending the item other than as permitted by this regulation.

“(4) More than two hundred substantially similar items are sent, in a single calendar month, excluding any item sent in response to an unsolicited request and any item described in subdivision (b).”

In order for an item to be a prohibited “mass mailing” as defined under the Act, all four, enumerated criteria listed above must be met. (See Reg. 18901, subds.(a)(1) – (a)(4).) If all four criteria under subdivision (a) apply, the mass mailing shall be prohibited, barring the application of any exceptions. (See e.g., Reg. 18901, subds.(b)(1) – (b)(11) [listing the general exceptions to the Act’s mass mailing prohibition].)

B. “Elected Officer”

1. MCERA’s Appointed Board Members

As previously indicated, if one or more of the four criteria enumerated in regulation 18901, subdivision (a), do not apply to the newsletter or mailer in question, it will not be deemed a prohibited mass mailing. The second of those four criteria indicates that if no reference is made to an “elected officer,” the contemplated mailing will not be prohibited. (Reg. 18901(a)(2).) Since four of the nine sitting members on the MCERA Board are appointed by the County’s Board of Supervisors, regulation 18901 does not regulate the manner in which the appointees to the Board are referred to in a contemplated mailing.

2. MCERA’s Elected Board Members Are Not “Elected” Pursuant To Regulation 18901

The next question is, therefore, whether the remaining four sitting members (plus two alternates) and the ex-officio member, are deemed to be “elected officers” under regulation 18901. We first analyze the status of the board members elected by the MCERA membership.

According to the Act, an “elected officer” is any person who holds an *elective office*, has been elected to an *elective office* but has not yet taken office, or who is appointed to fill a vacant *elective office*. (Section 82020.) “Elective office” means any state, regional, county, municipal, district, or judicial office which is filled at an *election*, as well as membership on a county central committee of a qualified political party, and members elected to the Board of Administration of the Public Employees’ Retirement System (PERS).² (Section 82023.) An “election” means any primary, general, special or recall election held in this state. (Section 82022.)

The Commission’s staff has advised that certain agencies and their officers are not subject to the Act because the types of officers, and/or the manner in which they were elected, does not satisfy the Act’s definition of “elected officers.” (See, e.g., *Eiser* Advice Letter, No. I-95-075 [regarding board members of a city’s redevelopment project area committee voted on by only those situated in a defined geographic area]; *Moon* Advice Letter, No. A-88-461 [regarding vice-chairman of the California Democratic Party].)

² The phrase “and members elected to the Board of Administration of the Public Employees’ Retirement System” was added to the end of section 82023 in 1998 by SB 1753. (Stats. 1998, Ch. 923.) Therefore, prior to 1998, PERS board members were not considered to have held “elective office.”

The four sitting (plus two alternate) members of the MCERA Board are not “elected officers” as that phrase is used in section 89001 and regulation 18901. As with pre-1998 PERS board members, the MCERA Board members: (1) are voted for by a closed membership that is small in number, i.e., by less than 5,000 people, (2) exercise duties over a narrow range of issues affecting that small pool of voters, and (3) are not explicitly included in any statute or regulation defining “elected officer.” Therefore, as with the appointed members of the MCERA Board, references to the four sitting (plus two alternate) members elected to the Board in a mass mailing are not subject to regulation 18901.

3. MCERA’s Ex-Officio Board Member Is “Elected” Pursuant To Regulation 18901

The only remaining question is whether the last remaining member of the Board, who holds that office (ex-officio) by virtue of holding elected office as Marin County Treasurer is subject to the mass mailing prohibitions of the Act. We conclude that since the County Treasurer holds a county “elective office,” as defined in section 82023, the County Treasurer is subject to all strictures imposed by the Act, including those pertaining to mass mailings.

Therefore, the remainder of this letter advises you only as to how the MCERA may be restricted by the Act in referring to its ex-officio member (the Marin County Treasurer) in its mass mailings.

C. Transmission Of A “Tangible” Item

Subdivision (a)(1), of regulation 18901, only restricts items that are mailed or delivered, by any means, to a person's home, office or post office box. If items are set out for the public to pick up on their own, or are handed out in a public area, the restrictions of the regulation do not apply. You have not described exactly how the brochures are distributed. If the brochures are mailed or delivered, by any means, to a person’s home, office or post office box, this criterion would be met. In addition, subdivision (a)(1), of regulation 18901, only restricts mass mailing items that are “tangible” such as “videotape, record, or button, or a written document.”

Website postings, which are not tangible, are not regulated by regulation 18901. (*Cook* Advice Letter, No. I-02-123; *Peterson* Advice Letter, No. A-99-013; *Footte* Advice Letter, No. A-98-114; *Doyle* Advice Letter, No. I-94-364.) However, we do not provide you with an analysis as to whether the type of information (in the form of, e.g., undescribed writings or photographs) you wish to display on your website might be prohibited by other laws outside the scope of the Act and its attendant regulations.³

³ Laws outside the Act which may be implicated by your website include, but are not limited to, section 8314 and Penal Code section 424 which proscribe the use of public moneys for campaign-related activities by state and local governmental entities. (See also *Stanson v. Mott* (1976) 17 Cal.3d 206.

D. References To Elected Officers Affiliated With The Agency

Subdivision (a)(2), of regulation 18901, generally describes two categories of mass mailings which are regulated under the Act: (A) items that feature an elected officer affiliated with the agency producing or sending the mailing, and (B) items that don't necessarily feature, but *include*, a reference to an elected officer affiliated with the agency and are prepared or sent in cooperation with that elected officer. You should be aware that these two general restrictions have some exceptions found in subdivision (b) of regulation 18901.

Regardless, a mass mailing which does not include any reference to an elected officer affiliated with the agency that produces or distributes the mailing is not subject to the restrictions of the regulation. (Reg. 18901, subd.(a)(2); *Dale* Advice Letter, No. A-02-331.) An "[e]lected officer affiliated with the agency" is defined as an elected officer who is a "member, officer, or employee of the agency, or of a subunit thereof such as a committee, or who has supervisory control over the agency, or who appoints one or more members of the agency." (Reg. 18901, subd.(c)(1).)

1. Items Featuring An Elected Officer

If a mass mailing "features" an elected officer, it is subject to regulation 18901. (See Reg. 18901, subd.(a)(2)(A).) A mass mailing "[f]eatures an elected officer" if it includes the elected officer's photograph or signature, or singles out the elected officer by the manner of display of his or her name or office in the layout of the document, such as by headlines, captions, type size, typeface, or type color. (Reg. 18901, subd.(c)(2); see also Reg. 18901, subd. (b)(9)(B).)

Therefore, any tangible mass mailing item including any photographs of an elected officer affiliated with the agency is prohibited. (Reg. 18901, subds.(a)(2)(A), (b)(9)(B) and (c)(2).)

2. Items Referencing An Elected Officer, The Preparation Or Sending Of Which Is Accomplished In Cooperation With The Official

If a mass mailing merely includes a reference to, but does not necessarily *feature*, an elected officer affiliated with the agency which produces or sends the mailing, and is prepared or sent in cooperation, consultation, coordination, or concert with the elected officer, it is subject to regulation 18901. (Reg. 18901, subd.(a)(2)(B).) A mass mailing references an elected official when it includes the name, office, photograph, or other reference to that person. (*Ibid.*)

E. Public Money

Pursuant to subdivision (a)(3), the "public money" criterion of the regulation is met if: "(A) Any of the costs of distribution are paid for with public moneys; or [¶] (B) Costs of design, production, and printing exceeding \$ 50.00 are paid with public moneys,

and the design, production, or printing is done with the intent of sending the item other than as permitted by this regulation.”

Since you have indicated that the production and distribution of MCERA’s newsletter is funded with a mix of funds, from both Marin County area public entities and their employees, at least some public moneys are used to produce and distribute its newsletters. Even if a newsletter is only partially funded with public money, the mailing must comply with Section 89001. (*Moore* Advice Letter, No. A-99-234; *Battersby* Advice Letter, No. A-94-303; *Cf. Curtis* Advice Letter, No. A-94-303.) Therefore, such newsletters are subject to prohibition under subdivision (a)(3).

F. Over 200 Mailings Distributed

Pursuant to subdivision (a)(4) of regulation 18901, a mass mailing is subject to regulation if “[m]ore than two hundred substantially similar items are sent, in a single calendar month, excluding any item sent in response to an unsolicited request” and does not fit an exception listed in subdivision (b). (See definitions of, e.g., “substantially similar” [in subdivision (c)(3)] and “unsolicited request” [in subdivision (c)(4)].) An “unsolicited request” for a mass mailing includes a mass mailing recipient’s response to certain agency notices which indicate that, in the absence of a response, the recipient’s name will be purged from the mailing list for that mass mailing. (Reg. 18901(c)(4)(C).)

It should be noted that copies picked up at your offices or passed out at meetings do not count toward the 200-item limit. (Reg. 18901(c)(4)(A); *Moore* Advice Letter, No. A-93-307; *Waggoner* Advice Letter, No. A-92-247; *Alquist* Advice Letter, No. I-89-109.) In addition, “[a] person who subscribes to newspapers or other periodicals published by persons other than elected officers shall be deemed to have made unsolicited requests for materials published in those subscription publications.” (Reg. 18901(c)(4)(E); see *Jenkins* Advice Letter, No. A-01-213.)

You have indicated that the MCERA consists of nearly 5,000 members and your contemplated newsletter is sent to the membership. Unsolicited requests do not count toward the 200-piece limit under subdivision (a)(4)(A). However, since the newsletter is not a subscription newspaper or other periodical, the “unsolicited request” exception does not apply.

G. Exceptions

Regulation 18901 provides a variety of exceptions to the four-criteria prohibition described above. Those exceptions are contained in subdivision (b) of the regulation. Under subdivisions (b)(3) and (b)(4), regulation 18901 exempts inter-governmental and intra-governmental mailings sent in the normal course of business. Therefore, mailings which meet the criteria in subdivision (a) and which are sent in the normal course of business to other governmental entities or officers, or to intra-agency employees and other staff, will not be prohibited. (Reg. 18901(b)(3), (b)(4).)

MCERA members who are still employed by one of the Marin County governmental agencies which participate in MCERA, come within the ambit of this exception. (*Boyer* Advice Letter, No. A-04-080.) Therefore, tangible versions of the contemplated newsletter sent to MCERA members, who are still employees of its participating governmental entities, would not count toward the 200-piece limit (with or without reference to the County Treasurer).

To conclude, Regulation 18901 does not prohibit the MCERA from sending out mass mailings: (1) that contain certain information about non-elected Board members, (2) that appear on the association's website, and (3) that do not exceed 200 pieces, excluding those sent to members that are currently employed by an MCERA participating governmental entity.

If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,
Luisa Menchaca
General Counsel

By: Andreas C. Rockas
Staff Counsel, Legal Division

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